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No. 07-1239

In The
Supreme Court of the United States

DONALD C. WINTER,
SECRETARY OF THE NAVY, ET AL.,

Petitioners,

v.

NATURAL RESOURCES
DEFENSE COUNCIL, INC. ET AL.,

Respondents.

**On Writ Of Certiorari To The
Court Of Appeals For The Ninth Circuit**

BRIEF OF RESPONDENT CALIFORNIA COASTAL COMMISSION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent California Coastal Commission states that it is a state governmental agency created pursuant to state law (CA Pub. Resources Code § 30300) and not a public, private or nonprofit corporation.

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STATEMENT

According to the Navy's own assessment, its training exercises "will cause widespread harm to nearly thirty species of marine mammals, including five species of endangered species, and may cause permanent death or injury." App. 163a. Congress in the Marine Mammal Protection Act (MMPA), however, authorized the Secretary of Defense to exempt certain military activities from the MMPA despite their impact on marine mammals. 16 U.S.C. § 1371(f). One might reasonably expect that Congress, before allowing the Navy to implement this dramatic action, would demand full compliance with the National Environmental Policy Act (NEPA) because that would insure that the Navy's implementation of the Secretary's decision to jeopardize marine mammals would be fully informed. As this brief demonstrates, Congress did not excuse the Navy from compliance with NEPA, and the district court must retain equitable discretion to protect NEPA's important public policy of analyzing the environmental consequences of actions *before* they occur.

Consistent with this policy, the district court issued a detailed, well-conceived preliminary injunction that allowed the Navy to continue its routine training exercises using mitigation measures to protect marine mammals from the harmful effects of mid-frequency active sonar until the Navy fully complies with NEPA. The district court's findings are not clearly erroneous and the court did not abuse its discretion. The Court of Appeals for the Ninth Circuit

properly affirmed the district court order. The courts below reached a fair and well-reasoned balance between the public's interest in a properly trained Navy and the public's interest in protecting marine mammals. This Court should affirm.

With regard to the first question presented, respondent California Coastal Commission (Commission) defers to respondents Natural Resources Defense Council, Inc., International Fund for Animal Welfare, Cetacean Society International, League for Coastal Protection, Ocean Futures Society, and Jean-Michel Cousteau. The Commission agrees with the arguments in their merits brief. The Commission addresses only the second question presented regarding the propriety of the preliminary injunction issued by the district court and affirmed by the court of appeals.

1. California's natural resources include marine mammals and their protection is vitally important to the State. The Commission is the state agency responsible for managing California's coastal zone, including implementing the policies of the California Coastal Act of 1976 requiring protection of marine resources, water quality and open coastal waters. CA Pub. Resources Code, §§ 30230, 30231, 30233, 30330. The Commission also has authority under the federal Coastal Zone Management Act (CZMA; 16 U.S.C. § 1451-1465) to review federal activities for consistency with California's federally approved coastal management program which includes the California Coastal Act of 1976. CA Pub. Resources Code,

§ 30330; 16 U.S.C. § 1456(c)(1)(A) and (C); *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 893-894 (C.D. Cal. 1978).

2. Pursuant to the CZMA, the Navy submitted a consistency determination to the Commission for routine training exercises off the coast of southern California. 16 U.S.C. § 1456(c)(1)(A) and (C). The Navy determined that a component of those exercises, the use of mid-frequency active (MFA) sonar, would not affect California's coastal zone. The Commission disagreed, finding that many of the species potentially affected by use of MFA sonar in the proposed training activities spend some portions of their life cycles within coastal waters, including marine species that swim in and out of the coastal zone. JA 276. Relying on numerous scientific studies and its prior experience with the Navy's use of sonar, the Commission conditionally concurred in the Navy's consistency determination with the requirement that the Navy incorporate additional monitoring and mitigation measures. JA 304-305. The Commission found that, only as conditioned, would the Navy's training exercises be consistent with the applicable marine resource, water quality and open coastal waters policies of California's coastal management program. JA 306. With regard to the use of MFA sonar, these conditions included *inter alia* a larger safety zone (requiring that the Navy either cease sonar transmission when a marine mammal is within 2 km as the Navy agreed to do in an earlier sonar operation or provide the Commission with information showing sonar intensity

and attenuation rates to a specified level of protection) and powering down the sonar when certain conditions are present (surface ducting which allows sound energy to travel farther). JA 317-325. The Navy refused to accept the Commission's conditions.[1]

3. Thereafter, on February 7, 2007 the Navy released its environmental assessment (EA) for the training exercises and its finding of no significant impact. JA 107-227. On March 22, 2007 the Commission filed a lawsuit against the Navy regarding its training exercises. *California Coastal Commission v. United States Department of the Navy et al.*, United States District Court, Central District of California, CV 07-01899 FMC (FMOx).[2] On that same day, respondents Natural Resources Defense Council, Inc., International Fund for Animal Welfare, Cetacean Society International, League for Coastal Protection, Ocean Futures Society, and Jean-Michel Cousteau (collectively NRDC) filed this litigation. On August 7, 2007, the district court partially granted NRDC's motion for a preliminary injunction, finding that

[1] The Commission and the Navy were in agreement with regard to most of the Commission's consistency conditions with the exception of the proper safety zone and powering down when surface ducting conditions are present. Those two conditions were also included in the district court's modified preliminary injunction and remain the mitigation measures in contention. Pet. Brief at 51-54.

[2] The Commission's case has been stayed pending resolution of the appeal in this case. The Commission intervened on appeal as an appellee in this case.

NRDC demonstrated a probability of success on the merits and the possibility of irreparable harm. App. 195a-218a. The district court found, based on the numerous scientific studies, declarations, reports and other evidence before it, plaintiffs established to a near certainty that the use of MFA sonar will cause irreparable injury to the environment and to NRDC. App. 217a. The district court's decision was based in large part on the Navy's own EA which concluded that its actions will result in 170,000 instances of Level B harassment, including 8,000 temporary threshold shift exposures and 466 cases of permanent injury to beaked and ziphiid whales. App. 204a. The district court found the Navy's evidence of predicted injury to 436 Cuvier's beaked whales was especially significant in light of the National Oceanic and Atmospheric Administration's (NOAA) estimate that there are as few as 1,211 such whales remaining off the entire west coast. App. 204a.

4. On August 16, 2007 the Navy filed an appeal and an emergency motion for stay. JA 1-2. On August 21, 2007 the Commission filed a motion to intervene on appeal and an opposition to the stay. JA 2. On August 31, 2007 the motions panel of the Court of Appeals for the Ninth Circuit granted the Navy's emergency motion to stay the preliminary injunction. App. 175a-194a. On October 25, 2007 the court of appeals granted the Commission's motion to intervene. JA 7. On November 13, 2007 the merits panel found plaintiffs had met the necessary burden of proof to demonstrate that some form of preliminary

injunctive relief was appropriate, had shown a strong likelihood of success on the merits as well as the possibility of irreparable injury, had shown the balance of hardships tipped in their favor and had shown the public interest would be advanced by an injunction that required adequate mitigation measures. App. 172a-173a. However, the panel found the district court had not adequately explained why a broad injunction was necessary. App. 173a. The court of appeals remanded the case to the district court with directions to narrow its injunction so as to provide mitigation conditions under which the Navy could conduct its training. App. 174a.

5. On remand, the district court considered the parties' briefs on proposed mitigation conditions and toured a Navy vessel to improve its understanding of the Navy's sonar training procedures and the feasibility of the proposed mitigation measures. App. 150a. On January 3, 2008 the district court issued a preliminary injunction that allowed the Navy to train using MFA sonar but subject to seven carefully tailored mitigation measures. App. 164a-170a. The district court again found that based on the numerous scientific studies, declarations, reports and other evidence submitted, plaintiffs demonstrated to a near certainty that use of MFA sonar during the planned training exercises "will cause irreparable harm to the environment and plaintiffs." App. 164a. The district court further found that the balance of hardships tipped in favor of issuing an injunction and that the harm to the environment, plaintiffs and the public

interest outweighed the harm that the Navy would incur or the public interest would suffer. App. 164a. The district court did not accept all of NRDC's arguments and took the Navy's concerns into consideration in crafting the mitigation measures. App. 103a-104a; 165a-170a. On January 10, 2008, on its own initiative, the district court further modified the mitigation measures to accommodate the Navy. App. 144a-149a.

6. The Navy then sought and obtained a presidential exemption from the CZMA (App. 231a-232a) and emergency authorization from the Council on Environmental Quality (CEQ) for alternative NEPA arrangements. App. 233a-248a. On January 16, 2008 the Navy moved the court of appeals ex parte for an order vacating the preliminary injunction or staying it pending appeal. JA 11. The court of appeals remanded to allow the district court in the first instance to consider the application. JA 12. The district court denied the Navy's application, finding the CEQ's action beyond the scope of its regulation and invalid; therefore the Navy was not exempt from compliance with NEPA. App. 97a. On February 27, 2008, the court of appeals heard oral argument and on February 29, 2008, the court of appeals issued a lengthy opinion affirming the district court's issuance of the modified preliminary injunction. App. 1a-90a. The court of appeals held the district court neither relied on erroneous legal premises nor abused its discretion. App. 90a.

SUMMARY OF RESPONDENT'S ARGUMENT

The question presented is whether the district court's injunction was consistent with equitable principles for issuing preliminary injunctive relief.

Petitioners contend that in amending the MMPA, Congress struck a balance between the military's training needs and marine mammal protection, and thus the district court lacked discretion to issue the injunction. However, unless Congress clearly provides otherwise, federal courts retain their traditional discretion acting as courts of equity to fashion injunctive relief. Here, Congress has not issued a clear and valid legislative command that displaces the court's traditional equitable discretion to issue injunctive relief with regard to NEPA.

While Congress authorized the Navy's training exercises to be exempted from the requirements of the MMPA, it did not preclude the district court from requiring the Navy to comply with NEPA. The MMPA and NEPA serve different purposes. The MMPA exemption allowed the Navy's activities to be exempt from the prohibition on taking marine mammals. In contrast, NEPA requires the Navy to fully consider the environmental consequences of its actions before they occur. Congress, in enacting the MMPA exemption, did not either expressly or by implication alter the Navy's obligation to comply with NEPA; thus, the district court was not precluded from exercising its equitable jurisdiction with regard to NEPA.

Where there are tensions between NEPA and other statutes, every federal agency must comply with NEPA unless there is a statutory conflict with the agency's authorizing legislation that expressly prohibits or makes full compliance with NEPA impossible. The MMPA neither prohibits nor makes NEPA compliance impossible. Further, Congress could have exempted the Navy from NEPA compliance but it did not. This Court assumes Congress knows about existing law pertinent to the legislation it enacts. This assumption is especially forceful where Congress provides for an exemption from one body of laws but not from others.

The courts below applied the proper standard for issuance of a preliminary injunction. Following this Court's precedent, the district court found there was sufficient likelihood of environmental injury to support a finding of irreparable injury. Specifically, the court determined that NRDC demonstrated a strong likelihood of success on the merits of their NEPA claim, that the Navy's own evidence established to a near certainty that the use of MFA sonar will cause irreparable injury to the environment and to plaintiffs, that the balance of hardships tipped in favor of granting an injunction and that the public interest outweighed the harm that the Navy would incur or the public interest would suffer if the Navy was prevented from using MFA sonar, absent the use of effective mitigation measures.

Petitioners argue that the court of appeals applied the wrong standard for irreparable injury.

Contrary to petitioners' argument, the appellate court did not use a "mere" possibility of injury standard; it stated correctly that, in the district court, NRDC had the burden of demonstrating the "possibility of irreparable injury." More importantly, petitioners' argument is misdirected. The *district court* applies this standard, which the appellate court reviews for abuse of discretion. The district court here found NRDC had demonstrated to a near certainty that irreparable injury would occur. The court of appeals properly reviewed the district court's order for abuse of discretion.

In asserting that the courts below erroneously found the possibility of irreparable injury, petitioners downplay the injury to marine mammals predicted in the Navy's own EA. The district court found the EA contained evidence that the training exercises will cause 170,000 Level B harassment exposures and 466 permanent injuries to marine mammals, including five endangered species. Contrary to petitioners' arguments, the court below correctly focused on irreparable injury to the environment. Such a focus is entirely appropriate in NEPA litigation. Petitioners' claims miss the whole point of a preliminary injunction which is to prevent the judicial process from being rendered futile by defendant's action. In environmental litigation, the injunction serves to prevent the defendant from causing environmental damage that cannot be undone. The district court did not abuse its discretion in considering injury to the environment.

The district court also properly balanced the relative hardships and public interest, finding the balance tipped in favor of issuing the injunction. The public has an interest in both a well-trained military and in protection of natural resources. The harm to the Navy was fully considered by the courts below. The courts also considered the Navy's admission that it had certified strike groups despite a lack of certain kinds of training and the fact that the Navy did not state it would cease training under the mitigated injunction. The courts did not err in declining to defer to the executive branch. They properly recognized the importance of national security but found that the armed forces must still comply with the law when conducting training. The district court carefully balanced the Navy's needs against the harm to the environment. It did not accept NRDC's sweeping mitigation measures, did accept many of the Navy's proposals regarding the mitigation to be imposed and carefully crafted the preliminary injunction to allow the Navy to train while still protecting marine mammals. The district court, sitting in equity, acted properly in issuing the preliminary injunction.

Strong public policy considerations support affirming the courts below. Absent a clear and unequivocal mandate from Congress to preclude the courts from exercising their power in equity, interference with the courts' traditional equitable authority will not be lightly assumed. Here, in the absence of such a mandate, the district court retained the equitable discretion to allow the Navy to train using

mitigation measures to protect California's coastal resources. Further, the Commission should not have to wait until injury to a species at a population level has occurred before it can seek judicial intervention to protect California's valuable coastal resources. Additionally, this Court should reject petitioners' argument that plaintiffs must proffer substantial proof and make a clear showing that injunctive relief is necessary to prevent irreparable injury. Where the injury sought to be enjoined is to a state's natural resources, a showing of the possibility of irreparable injury to those natural resources is sufficient.

Petitioners are not without recourse. If the mitigation measures render the Navy unable to certify sufficient naval forces to provide for the national defense, the Navy may return to the district court and request relief.

The Court should affirm the judgment of the court of appeals upholding the district court's issuance of the carefully tailored preliminary injunction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

NRDC addressed the first question presented by demonstrating in its merits brief that the district court properly determined that "emergency circumstances" did not exist and that the CEQ incorrectly

invoked this limited exception contained in 40 C.F.R. § 1506.11. The second question presented is whether the district court's injunction was consistent with established equitable principles for issuing preliminary injunctive relief.

Petitioners address this question in three separate arguments. They contend that (a) the district court lacked discretion to issue injunctive relief because Congress determined in the MMPA that the equitable balance between marine mammal protection and military activity must be struck in favor of military readiness when the Secretary of Defense exempts the exercise from MMPA; (b) the preliminary injunction was improperly based on the "mere possibility" of irreparable harm to respondents' interest; and (c) the district court's balancing of interests "dramatically diverges from established principles" and lacks support in the record. Pet. Brief at 34. None of these arguments has merit.

A. The District Court Had The Discretion To Issue Injunctive Relief.

District courts, acting as courts of equity, have discretion unless a statute clearly provides otherwise. *United States v. Oakland Cannibis Buyers' Coop.*, 532 U.S. 483, 496 (2001). Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's equity jurisdiction, the full scope of that jurisdiction is to be recognized and applied. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398

(1946). This Court will not lightly assume that Congress has intended to depart from established principles involving the exercise of the courts' discretion. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Here, Congress did not – either in so many words or by a necessary and inescapable inference – restrict the district court's ability to exercise its equitable powers to compel compliance with NEPA.

1. Congress, In Amending The MMPA, Did Not Give A Clear Legislative Command Regarding NEPA.

Petitioners argue that because Congress amended the MMPA to allow the Navy to be exempt from its provisions, Congress necessarily precluded the district court from exercising its discretion to compel compliance with NEPA. However, nothing in Congress's amendment of the MMPA gave a clear legislative command to alter the district court's equitable powers with regard to NEPA.

The MMPA generally prohibits the taking of marine mammals by harassment or killing without a properly issued permit. 16 U.S.C. §§ 1362-1374. Violation of the MMPA is punishable by civil liability for penalties and other enforcement mechanisms. 16 U.S.C §§ 1375-1377. Congress amended the MMPA to allow the Secretary of Defense to exempt Navy

activities from the prohibitions on taking marine mammals.[3]

As petitioners correctly point out, the Secretary of Defense has exempted the Navy's training exercises from the MMPA. App. 219a. Pursuant to 16 U.S.C. § 1371(f) the Secretary determined that it is necessary to exempt all military readiness activities that deploy MFA sonar from compliance with the requirements of the MMPA. App. 219a. The Secretary's action allows the Navy to train without applying for the otherwise required take permits but requires the Navy, during the exemption period, to execute a plan to come into full compliance with the MMPA. App. 220a. It did not preclude the district court from requiring compliance with NEPA. The district court exercised its equitable discretion based on the Navy's separate NEPA violation and the

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[3] The MMPA provides in 16 U.S.C. § 1371:

(f) Exemption of actions necessary for national defense

(1) The Secretary of Defense, after conferring with the Secretary of Commerce, the Secretary of the Interior, or both, as appropriate, may exempt any action or category of actions undertaken by the Department of Defense or its components from compliance with any requirement of this chapter, if the Secretary determines that it is necessary for national defense.

(2) An exemption granted under this subsection –

(A) subject to subparagraph (B), shall be effective for a period specified by the Secretary of Defense; and

(B) shall not be effective for more than 2 years.

district court's discretion must be preserved to protect Congress's decision to subject the Navy's activity to NEPA.

The MMPA and NEPA serve entirely different purposes. NEPA is the nation's premiere environmental protection statute and its purpose is to provide decision makers such as the Navy with sufficient information to prevent harm by considering alternatives and mitigation measures. NEPA also serves the important function of involving the public in the decision making process and fully informing the public about the environmental consequences of an action. In enacting NEPA Congress made clear that it was intended to further substantive environmental objectives and "promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. NEPA requires federal agencies to take a hard look at environmental consequences before undertaking their proposed actions. 42 U.S.C. § 4331. The NEPA process "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The NEPA process also insures that the information will be made available to the public so that it may participate in the decision making process and the decision's implementation. *Id.* Here, it was entirely reasonable for Congress to require the Navy to fully consider the environmental consequences of its activities, including mitigation measures and alternatives, and to

allow the public to participate in that decision making process.

The Navy cites a number of cases to support its view that a court has no discretion to ignore a Congressional balancing of priorities. Pet. Brief at 35. (citing *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 and *TVA v. Hill*, 437 U.S. 153 (1978)). The Navy's reliance on these cases here is misplaced. Indeed, both cases powerfully support respondents' position.

In *TVA v. Hill*, the government argued that the Endangered Species Act was impliedly repealed as to a dam project because Congress had continually authorized appropriations to build the dam. This Court, however, refused to prevent enforcement of the Endangered Species Act just because Congress had authorized and funded the dam project in other legislation. 437 U.S. at 189-193. The Court also refused to read a special "hardship exemption" into the Act. Because the Act contained no exemptions for federal agencies, the Court presumed that the Act's limited (and inapplicable) exemptions were the only hardship cases that Congress intended to exempt. *Id.* at 188. In *Oakland Cannabis Buyers' Coop*, the Court was unwilling to view Congress's omission of a medical exception to the Controlled Substances Act as an accident and was "unable in any event to override a legislative determination manifest in a statute." 532 U.S. at 493.

The parallels here of these cases are unmistakable – Congress has made a separate judgment that the Navy must follow NEPA, and this Court will not create exceptions or impliedly repeal NEPA in the absence of an irreconcilable conflict. The Court should not deprive the district court of equitable discretion to enforce NEPA pending trial because that would frustrate Congress's "manifest" determination that the Navy comply with NEPA.[4]

In sum, there is simply nothing in the statute authorizing the MMPA exemption that, either by its words or by necessity, precluded the district court from exercising discretion to issue a preliminary injunction to compel compliance with NEPA. In order to find that Congress has foreclosed the exercise of the usual discretion possessed by a court of equity, this Court has required that the purpose and language of the statute must limit the remedies available to the district court. *TVA v. Hill*, 437 U.S. 153 (imminent violation of the Endangered Species Act required injunctive relief); *compare*, *Weinberger v. Romero-Barcelo*, 456 U.S. 314-315 G (1982) (injunction was not the only means of insuring compliance with the Federal Water Pollution Control Act;

[4] This is especially so in light of the fact that there is no exemption in NEPA for either the national defense or national security. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1035 (9th Cir. 2006); *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988).

purpose of act could be achieved by compliance with the permit requirements where no water pollution occurred from unpermitted activities). Here, Congress only authorized the Navy to be exempt from the MMPA, not from NEPA. Had Congress intended to alter the Navy's NEPA obligations, it would have done so. This Court should decline to judicially amend NEPA by finding an exemption that Congress has not created. *See, e.g., Knight v. C.I.R.*, 128 S.Ct. 782, 791 (2008) (holding that even where Congress's decision entails some uncertainty, that is no excuse for judicial amendment of a statute.) Petitioners' argument regarding the MMPA must be rejected.

2. Under This Court's *Flint Ridge* Decision, Every Federal Agency Must Comply With NEPA Unless The Agency's Authorizing Authority Expressly Prohibits It Or Makes Full Compliance Impossible.

The district court's order comports with this Court's test for resolving tension between NEPA and other statutes. In *Flint Ridge Development Co. v. Scenic Rivers Assn. of Oklahoma*, 426 U.S. 776, 787-788 (1976), this Court held that every federal agency must comply with NEPA unless there is a statutory conflict with the agency's authorizing legislation that "expressly prohibits or makes full compliance" with NEPA impossible. *Id., citing* 115 Cong. Rec. 39703 (1969) (report of House conferees). In *Flint Ridge,* the Court found a conflict because the agency's

authorizing legislation contained a statutory deadline that made compliance with NEPA impossible. Here, the MMPA neither prohibits nor prevents the Navy from complying with NEPA, and therefore the Navy fails the *Flint Ridge* test.

Congress did not circumscribe the discretion of the district court in this case. Regardless of the MMPA exemption, it commanded that the Navy comply with NEPA.

3. Congress Could Have Exempted The Navy From NEPA But Did Not.

Petitioners argue that the MMPA exemption provision was a response to a federal court order in *Natural Resources Defense Council v. Evans*, 232 F.Supp.2d 1003 (N.D. Cal. 2002). In that case, the district court issued an injunction to permit the use of low frequency active sonar for testing and training with restrictions to protect marine mammals. However, that case was also brought under NEPA, and the district court in that case found "plaintiffs have shown a likelihood of establishing that defendants acted arbitrarily in only considering in effect one alternative – the chosen one – and not considering a feasible alternative excluding more, but not all, areas of high marine mammal concentration, while preserving the ability to train in a variety of conditions." *Id.* at 1041. The court found "plaintiffs have shown that they are likely to prevail on establishing violations of

the MMPA, NEPA, the ESA and the APA." *Id.* at 1053.

Thus, Congress passed the MMPA exemption at a time when the Navy was enjoined under *both* NEPA and the MMPA. Congress was no doubt aware that the court enjoined the Navy based on NEPA as well as on the MMPA. Had Congress intended to amend NEPA with respect to Navy activities, it would have done so. *See, Romer v. Carlucci*, 847 F.2d 445, 456 (8th Cir. 1988) (Department of Defense Authorization Act of 1984 requirement that Air Force file an environmental impact statement applied to missiles authorized for deployment but Air Force was not required to include a discussion of alternative basing modes since the Act expressly precluded NEPA review of alternative basing modes); *see also, Defenders of Wildlife v. Chertoff*, 527 F.Supp.2d 119 (2007) (Congress authorized the Secretary of Homeland Security to waive *all* legal requirements the Secretary determined necessary to ensure expeditious construction of the border fence (Pub. L. No. 109-113, 119 Stat. 231, 8 U.S.C. § 1103); Secretary properly waived the requirements of NEPA, the Arizona-Idaho Conservation Act and eighteen other laws as authorized by Congress), *cert. denied*, 128 S.Ct. 2962.

Moreover, this Court assumes Congress is aware of existing law pertinent to the legislation it enacts. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988). This assumption is especially forceful where Congress provides for an exemption from one

body of laws but not from others. Congress here authorized the Navy to be exempt only from the MMPA.

There is no contradiction between Congress's decision to make the Navy eligible for exemption from the MMPA's specific protections for marine mammals while still requiring the Navy to comply with NEPA by evaluating how the training exercises would affect marine mammals and ways to avoid or minimize those effects, including consideration of alternatives. *See, Natural Resources Defense Council v. Evans*, 232 F.Supp.2d at 1041.

Indeed, the Navy's position, if accepted, would partially repeal NEPA by implication. This Court, however, disfavors implied repeals of federal statutes. *E.g., Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Hagen v. Utah*, 510 U.S. 399, 416 (1994). Where two statutes are capable of co-existence, it is the "'duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984), *citing Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-134 (1974). The Court can and should give effect to both NEPA and the MMPA.

Unless exempted by Congress, our military must comply with the laws that protect the nation's resources even when training for military readiness purposes. As the court of appeals observed in *Ilio'uloakalani Coalition v. Rumsfeld*, 464 F.3d 1083,

1093 (9th Cir. 2006) "[s]trategic planning and the Army's metamorphosis are the Army's business, not the courts'. What involves us, however, is NEPA's requirement that the Army prepare an EIS to examine what effects any plans will have on the environment." *See also, Natural Resources Defense Council v. Evans*, 364 F.Supp.2d 1083, 1143 (N.D. Cal. 2003); *Makua v. Rumsfeld*, 163 F.Supp.2d 1202, 1221 (D. Haw. 2001).

Indeed, the Navy has acknowledged that it is subject to NEPA and has adopted regulations which require that it comply with NEPA at the earliest possible time to be an effective decision making tool. 32 C.F.R. § 775.3(a)(1). The Navy's regulations contemplate NEPA compliance even with regard to classified actions and continuing activities, including activities carried out in fulfillment of the Navy mission and function, such as existing training activities. 32 C.F.R. §§775.5-775.6. The Navy's failure to properly comply with NEPA here warranted issuance of the preliminary injunction which allowed the Navy to perform the training exercises with mitigation measures in place to protect California's natural resources until NEPA is fully complied with and the environmental consequences of the exercises are fully analyzed.

In summary, the Navy errs in insisting that the MMPA exemption foreclosed the district court from exercising its equitable powers to issue discretionary relief. Congress only exempted the Navy from the MMPA; it did not exempt Navy from the NEPA

process, and the district court must have discretion to prevent substantive harms to preserve meaningful NEPA review.

B. The Courts Below Properly Applied The Standards For Preliminary Injunctive Relief, Consistent With This Court's Formulation Of Those Standards.

1. The District Court Properly Relied On This Court's *Amoco Production* Decision.

The district court discussed generally the standards for a preliminary injunction. The court stated that "[w]here, as here, plaintiffs demonstrate a strong likelihood of prevailing on the merits of their claims and there is a 'possibility of irreparable harm,' injunctive relief is appropriate." App. 163a. Citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987), the court explained: "The Supreme Court has held that, '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.'" App. 163a-164a. The court found that plaintiffs demonstrated a strong likelihood of success on the merits of their NEPA claim, plaintiffs established to a near certainty that the use of MFA sonar will cause irreparable injury to the environment and to plaintiffs, the balance of hardships tipped in favor of granting an

injunction and the public interest outweighed the harm that defendants would incur or the public interest would suffer if defendants were prevented from using MFA sonar, absent the use of effective mitigation measures. App. 163a-164a, 200a-211a, 216a-218a. The district court applied the proper standards for preliminary injunctive relief.

2. The Courts Below Properly Found The Possibility Of Irreparable Injury.

a. The Court Of Appeals Did Not Use A "Mere Possibility Of Irreparable Injury" Standard.

Petitioners argue that the court of appeals used a "mere possibility of irreparable harm" standard. Pet. Brief 38-39. This is incorrect for at least two reasons. First, the court of appeals stated that NRDC had the burden of demonstrating the "possibility of irreparable injury" and that "NRDC must show the possibility of harm to its membership." App. 75a-76a. The court of appeals did not state that NRDC needed to show a "mere" possibility of harm. App. 75a. While the court of appeals cited to a case holding that a district court erred in requiring that plaintiff show a significant threat of irreparable injury rather than a "mere possibility of irreparable harm" (App. 76a-77a), that is not how the court formulated the standard in

reviewing the district court decision here.[5] Moreover, while the court rejected the Navy's argument that NRDC was required to demonstrate the possibility of irreparable injury at the species or stock-level, the court nevertheless found that NRDC would have satisfied that requirement. App. 77a. It stated that the district court found that NRDC had established to a near certainty that the use of MFA sonar "will cause irreparable injury to the environment and to NRDC's membership." App. 75a. The court of appeals' decision comports with this Court's formulation, cited by the district court, of the standard for review of a preliminary injunction in cases involving harm or injury to the environment. *Amoco Production Co. v. Gambell*, 480 U.S. at 545 (if such injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment).

Second, while it is doubtful that there is any material difference between the terms "possibility of harm" and "likelihood of harm" – this Court has employed both of them, *see, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) ("likelihood") and *Brown v. Chote*, 411 U.S. 452, 456 (1973) ("possibility") – petitioners are wrong to fault the Ninth Circuit. This

[5] Petitioners fail to cite a single case establishing that a possibility of harm is inadequate. They go so far as to misquote one of the cases they do cite, substituting "harm" for "success". Pet. Brief at 39 (quoting *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).) That case discussed the degree of success on the merits required for injunctive relief, not the degree of harm.

is the standard that the *district court* applies when it decides whether to issue a preliminary injunction. *Brown*, 411 U.S. at 456. The appellate courts, by contrast, "may only consider whether the issuance of the injunction constituted an abuse of discretion." *Id*. at 457; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion."). The court of appeal applied the abuse of discretion standard, App. 36a and 90a, and thus did not err.

b. The District Court Properly Found A Possibility Of Irreparable Injury Based On The Navy's Own Environmental Documents Which Predicted Injury To Marine Mammals.

In arguing that the courts below erroneously found the possibility of irreparable injury, petitioners characterize the possibility of irreparable injury as little more than "speculation." Pet. Brief 41-43. That "speculation" is based on the injury to marine mammals predicted in the Navy's own EA. The EA identified two levels of harassment, Level A and Level B, with Level A representing a permanent threshold shift which "is non-recoverable" and "must result from the destruction of tissues within the auditory

system." JA 165. The Navy's EA stated that this permanent threshold shift "qualifies as an injury." JA 165. The Navy's EA considered all beaked whale harassment to be Level A harassment. JA 166. The EA predicted numerous injuries to marine mammals from the Navy's use of MFA sonar. For example, the excerpts from the EA included in the joint appendix state that of the 152 Baird's Beaked Whales on the west coast, 4 would be exposed to Level A harassment. JA 178-179. The EA states that 8 Common Dolphin will be exposed to Level A harassment. JA 183. Of the 1,121 Cuvier's Beaked Whales on the west coast, 218 incidents of Level A harassment are predicted. JA 185. Of the 766 Ziphiid Beaked Whales, 52 individuals will be exposed to Level A harassment. JA 198-199.

Petitioners obliquely invite this Court to reweigh the evidence and make its own factual finding that the Navy's use of MFA sonar is not likely to harm marine mammals. Pet. Brief at 39-43. Again, petitioners ignore the standard of review. "[A]ppellate courts must constantly have in mind that their function is not to decide the factual issues de novo." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985) quotations omitted. The district court found that irreparable harm was likely – indeed, that it was a "near certainty." App. 164a. This Court defers to a district court's factual findings unless they are clearly erroneous. Fed. R. Civ. P., Rule 52(a)(6).

Petitioners attempt to downplay the evidence of harm to marine mammals provided in the Navy's EA. Petitioners argue that the Navy's modeling predicted only Level A harassment to eight common dolphins. Pet. Brief at 44. They further claim that even though the computer modeling predicted only Level B harassment for beaked whales, the Navy adopted a policy of modeling Level B harassment as Level A for certain beaked whale species. Pet. Brief at 44. However, in the EA, the Navy explained that it based its behavioral effects threshold primarily on behavioral observations reported in scientific studies. JA 166-167. With regard to beaked whales, the Navy considered one stranding where Navy MFA sonar was identified as "the most plausible contributory source to the stranding event." JA 168. The Navy acknowledged that beaked whales are expected in the deeper portions of the area where the training exercises will occur. JA 170. The Navy stated that since the exact cause of stranding events are unknown and meaningful impact thresholds cannot be derived specifically for beaked whales, the Navy took a conservative approach and treated all behavioral disturbance of beaked whales as a potential injury. JA 170. The district court's reliance on the Navy's conservative approach is not clear error because now, in litigation, the Navy is prepared to discard that approach.

The district court had before it not only the Navy's EA but also declarations from both sides and documentary evidence of harm to marine mammals. For instance, the record contains evidence of mass

strandings of several species of whales following naval exercises in the Bahamas, the Canary Islands, Hawaii, North Carolina, Japan, Greece, Spain, Taiwan, the Madeira archipelago, and the U.S. Virgin Islands. JA 94-104. Additionally, after dedicating several symposia to the issue, the International Whaling Commission's Scientific Committee concluded that the weight of accumulated evidence associated MFA sonar with mass beaked whale strandings. JA 735. The district court also relied on conclusions by the Navy's Office of Naval Research that the evidence of sonar causation of whale beaching is "completely convincing and there is a serious issue of how best to avoid/minimize future beaching events." App. 156a; JA 99. The district court found that the EA alone contained evidence that the training exercises "will cause 170,000 Level B harassment exposures and 466 permanent injuries to marine mammals, including five endangered species." App. 157a. The district court's factual findings, based on the Navy's own reports, are not clearly erroneous and must be affirmed. Fed. R. Civ. P., Rule 52(a); Wright, Miller & Kane, *Federal Practice & Proc.*; Civil 2d § 2962 p. 443 (2nd ed. 1995).

Finally with regard to irreparable injury, petitioners contend that the courts below erroneously focused on irreparable injury to the environment rather than to respondents themselves. Pet. Brief 43-45. Petitioners confuse irreparable injury with the injury-in-fact requirements for standing under Article III. Pet. Brief at 43. They are not the same. Although

standing does require an injury to the plaintiff, as opposed to the environment, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180-181 (2000), standing does not require an irreparable injury at all. It can be a purely economic injury. *E.g.*, *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (lower stock values demonstrate injury-in-fact for standing purposes). The injury-in-fact requirement simply ensures that the plaintiff has a "personal stake" in the dispute, and thus a legitimate controversy for purposes of Article III. *Clinton v. City of New York*, 524 U.S. 417, 429-430 (1998); *Japan Whaling Assoc. v. American Cetacean Society*, 478 U.S. 221, 230 n. 4 (1986) (whale watchers "undoubtably have alleged a sufficient injury-in-fact" to establish standing).

By contrast, for purposes of a preliminary injunction, it is entirely proper for the district court to consider irreparable harm to the environment. In NEPA litigation, it is ubiquitous. *See, e.g., Aberdeen & Rockfish R. Co. v. Students Challenging Agency Procedures*, 409 U.S. 1207, 1216-1218 (1975) (Burger, C.J., on denial of stay); D. Mandelker, *NEPA Law and Litigation*, § 4-58, pp. 4-194 to 4-195 (2d ed. 2008) (collecting cases). As this Court stated in *Amoco Production Co. v. Village of Gambell*, 480 U.S. at 545, environmental injury is nearly always irreparable, and, "[i]f such an injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."

Indeed, petitioners miss the basic point of a preliminary injunction. The purpose of a preliminary injunction is to preserve the relative positions of the parties until trial on the merits and to prevent the judicial process from being rendered futile by defendant's action. *Univ. of Tex. v. Camarillo*, 451 U.S. 390, 394 (1981); Wright, Miller & Kane, *Federal Practice & Proc.*, Civil 2d § 2947, p. 123 (2nd ed. 1995). In other words, a preliminary injunction both protects the plaintiff from harm and preserves the court's power to render a meaningful decision on the merits. *Id*., p. 121; *Doran*, 422 U.S. at 932 (upholding preliminary injunction in part because "otherwise a favorable final judgment might well be useless"). When the merits concern an environmental statute, the question is whether an injunction would keep the defendant from causing environmental damage that a final judgment on the merits could not undo. *See, Amoco Production*, 480 U.S. at 545.

The answer to that question here is yes. Though procedural, NEPA is designed to prevent environmental harm, not to generate paper. 40 C.F.R. § 1500.1(c); *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 348-349. NEPA requires the Navy to prepare an EIS *before* killing and injuring scores of marine mammals. *See* 40 C.F.R §§ 1502.5, 1506.1. In the EIS, the Navy must consider ways to avoid or lessen the damage. 40 C.F.R. §§ 1502.14, 1508.20. Once the damage is done, it cannot be undone. The injunction preserves the district court's

power to render a meaningful decision on the merits of respondents' NEPA claim.

In short, the district court did not abuse its discretion by considering irreparable harm to the environment.

3. The District Court Correctly Balanced The Hardships And Public Interests.

The district court also properly balanced the relative hardships and public interests. The court found that the "balance of hardships tips in favor of granting an injunction, as the harm to the environment, Plaintiffs and public interest outweighs the harm that Defendants would incur (or the public interest would suffer) if Defendants were prevented from using MFA sonar, absent the use of effective mitigation measures, during a subset of their regular activities in one part of one state for a limited period." App. 164a. The public undoubtedly has an important interest in a well-trained military. However, the public also has an important interest in protection of coastal resources.

Petitioners argue that the balance of hardships tips decisively against an injunction. Pet. Brief at 46. They cite to the appellate court motions panel's observation that the United States is involved in war in two countries but petitioners noticeably omit the panel's subsequent statement that the safety of the whales as well as the safety of our warriors and of our

country must be weighed. App. 182a.[6] Petitioners further contend that the Navy "could" be unable to train and successfully certify a strike group, claiming the appellate court failed to weigh the magnitude of potential harm. Pet. Brief at 47. This claim ignores the appellate court's detailed analysis of the harm to the Navy of the mitigated preliminary injunction (JA 78a-89a) and the Navy's own admission during oral argument that it can certify strike groups despite the inability to train in surface ducting conditions. JA 80a. Moreover, as the appellate court observed, the Navy did not represent to the courts below that it will cease its training exercises if the injunction were upheld. JA 80a n. 61. Indeed, the declaration cited by petitioners discusses the Navy's inability to train if precluded from using MFA sonar entirely, not if allowed to train using mitigation measures. JA 577.[7] And in a prior consistency determination for sonar activities off the central coast of California (CD-37-06 Navy Monterey Bay), the Navy agreed to use a horizontal distance calculation of 154 dB and, if that meant a larger preclusion zone, then that would

[6] Of these two countries, Afghanistan is land-locked and Iraq has a nominal ocean connection. Training with MFA sonar to detect submarines appears to have a tenuous connection with those conflicts.

[7] Petitioners quote a century-old observation by Theodore Roosevelt about the need to practice at sea. Pet. Brief at 48. It is equally well known, however, that Roosevelt valued our country's natural resources as well. It is precisely the need to balance such competing important interests which the courts below carefully considered.

become the preclusion zone. JA 278-285.[8] Additionally, the district court found, based on the evidence presented to it, that the Navy had employed mitigation measures in the past without sacrificing training objectives. App. 136a, 158a. The court further determined that there was no evidence in the record that the Navy will suffer irreparable injury. App. 136a. The Navy has not established that the district court's factual findings were clearly erroneous.

Petitioners also contend the appellate court ignored the degree to which an injunction is necessary to further the purposes of the statute, claiming that because the Navy prepared an EA, the purpose of NEPA was served. Pet. Brief at 49. This is obviously incorrect. The Navy failed to comply with NEPA's obligation to take a hard look at its actions *before* undertaking them, the Navy erroneously found there would be no significant impact to the environment from its exercises despite evidence to the contrary in its EA and the Navy wants to complete its action without fully analyzing the environmental

[8] The Navy's prior agreement to use a lower received level formed the basis for the Commission's condition of approval for these exercises. JA 284-285. The Commission required the Navy to use a marine mammal preclusion zone in which the received level has attenuated to 154 dB or, if that cannot be achieved, to either cease sonar transmission when a marine mammal was within 2 km or provide the Commission information supporting the Navy's provision of a safety zone as close as possible to 154 dB. JA 261. The Commission's condition closely resembled the district court mitigation measure regarding the safety zone. App. 139a.

effects. The purpose of NEPA is to provide decision makers such as the Navy with sufficient information to prevent harm, not to generate useless environmental impact statements after the harm has occurred. As this Court observed, the role of the court is to insure that the agency has taken a hard look at environmental consequences. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). NEPA's purpose is clearly *not* fully served by the mere preparation of an EA.

Petitioners further contend that the courts below erred in refusing to defer to the executive branch and the Chief of Naval Operations (CNO). They complain that the appellate court "did not even mention" the President's determination under the CZMA. Pet. Brief at 50. Petitioners are mistaken. The appellate court did mention the President's action in its recitation of the facts (App. 6a) but it was not relevant to the court's review of the district court decision. The district court discussed the President's action which occurred under the CZMA, not NEPA, and found that it was constitutionally suspect under the doctrine of separation of powers. App. 124a-134a. However, the district court found it unnecessary to address the President's constitutionally questionable action because the court's injunction stood firm on NEPA grounds. App. 134a. Petitioners did not present the question of the Presidential exemption under the CZMA for review by this Court. Thus, the appellate court's failure to discuss an issue on which the district court did not base its decision is irrelevant.

The appellate court did recognize the importance of protecting national security. The court also observed that in the face of assertions of potential harm to military readiness, courts have held that the armed forces must take precautionary measures to comply with the law during its training, citing cases involving carefully tailored injunctions. App. 88a. The court explained that the "district court here carefully balanced the significant interests and hardships at stake to ensure that the Navy could continue to train without causing undue harm to the environment. We review that balance to determine whether it rests on clearly erroneous findings of fact. Having concluded that it does not, we determine that the district court did not abuse its discretion and therefore do not disturb its carefully considered injunction." App. 88a. The appellate court did not err in applying traditional standards of review for preliminary injunctions in this case, even though it involves military readiness.[9]

California has a strong public interest in protecting its coastal resources, including marine mammals which are a natural resource of California's coastal zone. *See, California v. Norton*, 311 F.3d 1162, 1171,

[9] Petitioners also complain that the appellate court erred in not deferring to the Navy's military assessment, noting that the after action reports "simply did not specify whether encounters occurred at tactically significant periods." Pet. Brief at 52. The after action reports were prepared by the Navy and any deficiency or failure to specify was the Navy's fault. Petitioners cannot fault the courts for omissions and lack of adequate explanation in the Navy's own evidence.

n. 5 (9th Cir. 2002); 15 C.F.R. § 930.11 (natural resource includes marine mammals found within a state's coastal zone on a regular or cyclical basis); CA Pub. Resources Code, §§ 30001 (permanent protection of the state's natural resources is a paramount concern to present and future residents of the state and nation), 30230 (marine resources shall be maintained and uses of the marine environment shall be carried out in a manner that sustains the biological productivity of coastal waters), 30231 (biological productivity of coastal waters shall be maintained). California recognizes that such protection offers many benefits including conservation, enhancing recreational opportunities and contributing to the economy through tourism. *See*, *e.g.*, CA Pub. Resources Code, § 36601 (providing for marine managed areas). California's extraordinary marine biological diversity is a vital asset to the state and nation and is important to public health and well being, ecological health and ocean dependent industry. *See*, *e.g.*, CA Fish & Game Code, § 2851 (providing for marine life protection). Further evidencing the value of marine mammals to California, the California Legislature designated the gray whale as the state marine mammal. CA Gov. Code, § 425.5.

The public's interest in protecting marine mammals cannot be gainsaid. The district court properly balanced the public's interest in having both a well-trained Navy and protecting California's natural resources.

Moreover, the district court carefully considered the impacts on the Navy of its injunction. In issuing the modified preliminary injunction, the district court did not accept all of the mitigation measures proffered by plaintiffs and accepted many of the mitigation measures offered by the Navy. In the order denying the Navy's ex parte application to vacate or stay the preliminary injunction, the district court explained its approach to issuing the preliminary injunction. The district court stated that the "Court determined that while Defendant's proposed measures were inadequate, Plaintiffs' proposed measures were too sweeping." App. 103a. The court accepted a number of the Navy's arguments and tailored the injunction to allow training to occur at night and in low visibility, providing for a 12 nautical mile instead of 25 nautical mile exclusion zone, and allowing training around sea mounts, near the Tanner and Cortez Banks and in waters shallower than 1,500 meters. App. 104a. In accepting the Navy's arguments, the court relied on the declaration by Rear Admiral John M. Bird stating that MFA sonar training must be conducted at night, in low visibility conditions and in the varying bathymetry present in Southern California's littoral regions to be realistic. App. 103a-104a. The court also accepted the Navy's concession that it could maintain a 12 nautical mile exclusion zone without compromising training. App. 104a. However, instead of using broad geographical exclusions, the court opted for measures to promote the sighting of whales and a larger "safety zone" to prevent injurious exposure to MFA sonar. App. 104a.

The court ordered the Navy to improve monitoring efforts by instituting aerial monitoring for sixty minutes before exercises using MFA sonar, providing trained lookouts, and using existing passive acoustic monitoring devices to the extent possible. App. 104a. The court ordered the Navy to maintain a 12 nautical mile coastal exclusion zone, secure MFA sonar when marine mammals are spotted within 2,200 yards, power down MFA sonar in the presence of significant surface ducting conditions which cause sound to travel further at higher intensities and to avoid the use of MFA sonar in the geographically restricted, biologically rich Catalina Basin. App. 104a-105a.[10]

The district court's detailed, thoughtfully conceived injunction was appropriate. *See, National Audubon Society v. Department of the Navy*, 422 F.3d 174, 203-207 (4th Cir. 2005) (remanding the case to the district court to issue a tailored preliminary injunction, explaining that the Navy should be allowed to conduct activities related to military readiness that will not harm the environment and enjoined from activities that would cause harm or limit its

[10] In affirming the district court order, the court of appeals observed that while it recognized that each Navy has unique operating requirements, the record showed that NATO imposes the same 2,000 meter shutdown zone when a marine mammal is detected as required by the district court and that the Australian Navy goes farther, mandating a shutdown if a marine mammal is detected within 4,000 yards of a sonar-emitting vessel. App. 84a, n. 67; *see also,* JA 347 (Royal Australian Navy management plan).

reasonable choice of alternatives). The district court here properly exercised its duty, sitting as a court of equity, to grant injunctive relief "upon conditions that will protect all – including the public – whose interests the injunction may affect." *Inland Steele Co. v. United States*, 306 U.S. 153, 157 (1939).[11]

This case resembles another case involving the Navy and its military training activities, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, with one important difference; here, unlike in *Weinberger*, there is evidence of environmental harm warranting injunctive relief against the Navy. In *Weinberger*, the Navy used Vieques Island for weapons training. During air-to-ground training, pilots sometimes missed and ordnance fell into the sea. While this was a technical violation of the Federal Water Pollution Control Act (FWPCA), the district court found the Navy's unpermitted discharge had not harmed the quality of the water. *Id.* at 307. The district court found that a permit under the FWPCA was necessary for the Navy's activities. The court ordered the Navy to apply for a permit but declined to enjoin the Navy's weapon training because of the lack of appreciable harm to the environment. *Id.* at 310. The Court of Appeals for

[11] Petitioners mistakenly contend that the Administrative Procedures Act provides a basis for overturning the courts below. That Act allows a court to either grant injunctive relief or limit relief to a declaration of the parties' rights. Where, as here, the court finds the possibility of irreparable injury, injunctive relief under the Act is appropriate. 5 U.S.C. § 702-703.

the First Circuit held the district court erred in denying injunctive relief and refused to engage in balancing due to a perceived statutory obligation to protect coastal waters. *Id.* at 310-311. This Court reversed, finding the district court properly denied preliminary injunctive relief. The Court found that the district court properly ordered the Navy to apply for a permit but also properly denied injunctive relief because the Navy's discharge of ordnance had not polluted the water. As the Court explained, the FWPCA permitted the district court to order the relief it considered necessary to secure prompt compliance with the Act; that relief could include, but was not limited to, an order of immediate cessation. *Id.* at 320.

Here, in contrast to *Weinberger*, the district court was faced with clear evidence of harm caused by the Navy's training activities, harm evidenced by the Navy's own environmental documents and reports. Under these circumstances, the district court correctly exercised its equitable powers to arrive at a "'nice adjustment and reconciliation' between the competing claims." *Id.* at 312, quoting *Hecht v. Bowles*, 321 U.S. 321, 329 (1944). The district court balanced the "'conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.'" *Id.*, citing *Yankus v. United States,* 321 U.S. 414, 440 (1944). As this Court stated in *Weinberger*, the "'essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to

the necessities of the particular case.'" *Id*., quoting *Hecht v. Bowles*. This is precisely what the court below did – the district court molded the preliminary injunction to the necessities of this case.

II. STRONG POLICY REASONS SUPPORT AFFIRMING THE COURTS BELOW.

Strong policy reasons support affirming the judgment of the court of appeals and the order of the district court. Absent a clear and unequivocal legislative mandate from Congress to preclude the courts from exercising their power in equity, interference with the courts' traditional equitable authority will not be lightly assumed. Where, as here, Congress has not evinced such a mandate in authorizing the Navy to be exempted only from the MMPA, a district court should not be precluded from issuing a carefully tailored injunction. To hold otherwise would be a drastic departure from this Court's historic jurisprudence.

Petitioners argue for a breathtakingly narrow interpretation of irreparable injury to California's natural resources. They assert that irreparable injury exists only if plaintiffs establish a likelihood of harm to a species *as a whole* and that harm is permanent, or at least of long duration. This Court should reject this unduly restrictive understanding of irreparable injury. The Commission would be denied effective relief if it had to wait until injury to a species at a population level has already occurred before it could

seek judicial intervention to protect California's valuable coastal resources.

Additionally, this Court should reject petitioners' argument that plaintiffs must proffer substantial proof and make a clear showing that injunctive relief is necessary to prevent irreparable injury. Pet. Brief at 39. The Commission must be able to seek such relief against a defendant when the Commission demonstrates that irreparable injury to coastal resources is possible. There is no justification for curtailing the authority of States to seek injunctive relief to protect their sovereign resources, particularly when a State has established a strong likelihood of prevailing on the legal merits of its claims against the federal government. Given the value and importance to California of protecting its coastal resources, this Court should refuse to limit the Commission's ability to protect those resources from the possibility of harm. As this Court recognized in *Amoco Production*, injury to the environment is nearly always irreparable. *Amoco Production Co. v. Gambell*, 480 U.S. at 545.

Finally, the Navy is not without recourse. If the mitigation measures render the Navy unable to certify sufficient naval forces to provide for the national defense, the Navy may return to the district court and request relief. App. 89a.

CONCLUSION

The judgment of the Court of Appeals upholding the district court's issuance of the preliminary injunction should be affirmed.

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Respectfully submitted,

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